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No. 88-1889

In the Supreme Court of the United States

OCTOBER TERM, 1989

JAMES F. NORTON, ET AL., PETITIONERS

v.

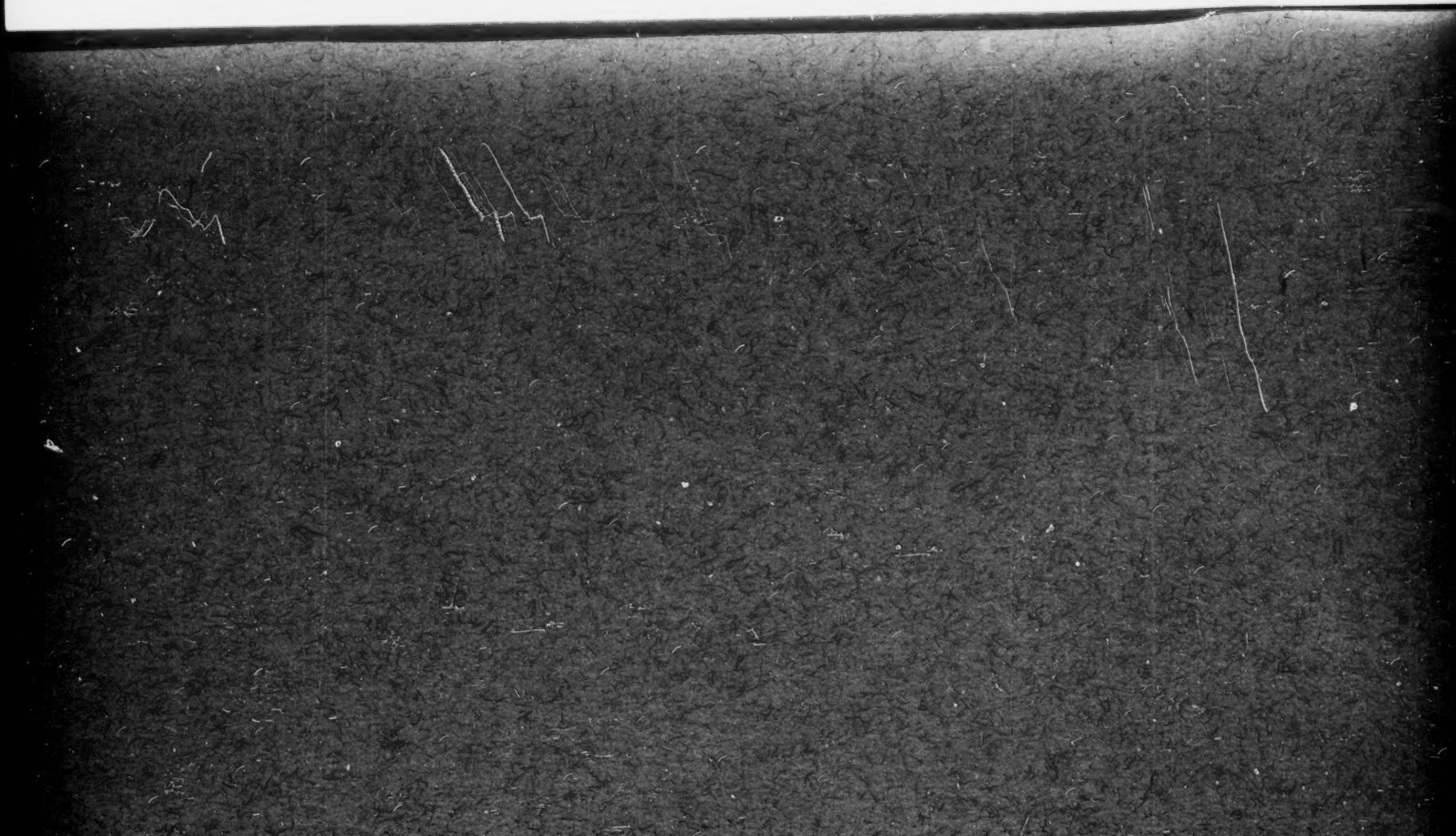
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether evidence seized in reliance on a search warrant should have been suppressed on the ground that the description of the property to be seized under the warrant was insufficiently particular.

2. Whether the district court's supplemental instruction to the jury was coercive.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-22) is reported at 867 F.2d 1354. An earlier opinion of the court of appeals (Pet. App. 36-44) is reported at 749 F.2d 1477. The district court's order on petitioner's motion to suppress (Pet. App. 26-33) and its order on remand (Pet. App. 23-25) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 16, 1989. The petition for a writ of certiorari was filed on May 15, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On June 3, 1981, a federal grand jury in the United States District Court for the Southern District of Florida issued an indictment charging petitioners and 12 co-defendants with conspiring to conduct the affairs of a labor union through a pattern of racketeering activities, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(d). Petitioners moved to suppress business records seized pursuant to two search warrants, and the district court granted their motion. On the government's appeal, the court of appeals reversed the suppression order, 749 F.2d 1477, and this Court denied certiorari, 474 U.S. 949 (1985). A jury trial resulted in a conviction of each of the four petitioners.[1] Each petitioner was sentenced to ten years' imprisonment. The court of appeals affirmed. Pet. App. 1-22.

1. The government's proof at trial was summarized by the court below. Pet. App. 2-3. In brief, the Laborers' International Union (Laborers) and its affiliated local unions in Chicago and Miami established various employee benefit plans, including the Chicago Trust Fund and the Southeast Trust Fund. In 1970, Laborers announced plans to provide dental care services to union members. Consultants & Administrators, Inc. (C&A), a Chicago-based corporation, was formed to provide those services. C&A did so by contracting with various labor unions to provide medical, dental, and vision services to union members through a network of clinics located in Chicago and South Florida. Petitioner Norton was presi-

[1] An earlier trial ended in a mistrial due to the exposure of the jury to extraneous materials during deliberations. A separate trial resulted in the conviction of eight other co-defendants; those convictions were upheld on appeal. *United States* v. *Caporale*, 806 F.2d 1487 (11th Cir.), cert. denied, 483 U.S. 1021 (1987).

dent of C&A. Petitioner DiFranco, a dentist, and petitioner Fosco, who purportedly handled sales and public relations, were vice-presidents of C&A. Angelo Fosco (petitioner Fosco's father) and James Caporale were union representatives and co-defendants. They exerted their influence to ensure that C&A obtained the contract for dental services in exchange for kickbacks made to them through C&A. The kickback funds were generated by inflating petitioners' salaries (other than that of petitioner Pinckard); the excess cash was then funneled through Daniel Milano, Sr., another owner of C&A, to Angelo Fosco and James Caporale.

In 1972, the operation expanded to Southeast Florida when C&A obtained a similar contract to provide dental care to union members. As before, C&A made kickback payments to various union representatives in connection with the contract. Regular payoffs were made from 1973 to 1977. Pet. App. 2.

In 1974, the Chicago dental services contract was amended to include vision services and dental services for the dependents of union members. Union representative and co-defendant Alfred Pilotto arranged for C&A to be awarded the expanded contract in return for a kickback of ten per cent of C&A's increased premiums. Petitioner Pinckard (Pilotto's son-in-law) acted as a conduit for these illegal payments from C&A to the union officials. Pet. App. 2-3.

2. The government's investigation of petitioners' activities is recounted in the affidavit of FBI Special Agent James Wagner, which was submitted in support of the government's applications for the search warrants in this case. Agent Wagner's affidavit was primarily based on information provided by Daniel Milano, Jr., who had re-

cently resigned as secretary-treasurer of C&A. Afft. paras. 1a, 1b.

According to Agent Wagner's affidavit, Milano stated that his father, Daniel Milano, Sr., the executive vice-president of C&A, had sole authority to bid on C&A's behalf on prospective union contracts. Afft. paras. 1a, 1f. Although all bids were supposedly sealed, Daniel Milano, Sr., customarily met with co-defendant union leaders Alfred Pilotto and Angelo Fosco before bidding on any contract. Afft. para. 1f.[2] Pilotto provided Daniel Milano, Sr., with information regarding competing bids, and both Pilotto and Fosco gave prior approval to all of C&A's bids. *Ibid.* As a result of this procedure, Daniel Milano, Sr., never authorized a bid that had not been pre-approved and never submitted a bid on a union health care contract that was not accepted. *Ibid.* In return for that favorable treatment, C&A regularly provided kickbacks to various labor officials. Afft. para. 1g.

Two entities—Pinckard and Associates, Inc., which was operated by petitioner Pinckard, and Fortune Services, Inc.—were incorporated to help divert revenue from C&A to finance the kickbacks. Afft. para. 1e. Although both entities were purportedly responsible for verifying the eligibility of persons receiving health services from C&A under its union contracts, Afft. para. 1d, Fortune Services in fact performed no functions whatsoever, and Pinckard and Associates merely placed calls to the union to verify eligibility. Afft. para. 1e. Neither Fortune Services nor

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[2] Pilotto was both president of the Laborers Local 5 in Chicago and vice-president of the Chicago Laborers District Council. Angelo Fosco was vice-president of the Laborers International Union of North America.

Pinckard and Associates had any corporate activities other than their contracts with C&A. Afft. para. 1d.[3]

Pursuant to an agreement between Daniel Milano, Sr., and Pilotto, Pinckard and Associates billed C&A for ten per cent of C&A's gross monthly receipts on its union contracts, while Fortune Services billed C&A for 15 per cent of C&A's gross receipts. Afft. paras. 1h, 1j. With respect to Pinckard's billing, Daniel Milano, Jr., furnished petitioner Pinckard with the figure for C&A's gross monthly receipts in the Chicago area, which averaged $200,000, in advance of the preparation of Pinckard's bill. Afft. para. 1h. With respect to Fortune Services, Daniel Milano, Jr., personally drew C&A checks for the monthly payments. In turn, Daniel Milano, Sr., delivered the checks to co-defendant Seymour Gopman's Miami law office, from which Fortune Services was run. Afft. para. 1j.

In addition to the diversion of funds through Pinckard and Associates and Fortune Services, all C&A officers were required to give $1,000 of their salaries to Daniel Milano, Sr., each month. Daniel Milano, Sr., collected the money in cash at the beginning of each month and kept it in envelopes in the drawer of his desk. Thereafter, Daniel Milano, Sr., distributed the cash to co-defendant union leaders Pilotto, Fosco, Dominick Senese, and Caporale. Afft. para. 1k.

Based on the information obtained from Daniel Milano, Jr., about the kickback scheme, the government decided to try to obtain access to the records of C&A and Pinckard and Associates. The decision was made to conduct a search of the premises of C&A and Pinckard and Asso-

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[3] Until June 1976, petitioner Pinckard operated Pinckard and Associates out of C&A's offices. Pinckard and Associates later moved to separate offices in the same building that housed C&A. Afft. para. 1i.

ciates, rather than issue subpoenas, because Daniel Milano, Jr., had told Agent Wagner that there was a "strong likelihood" that the records of the two companies would be destroyed or altered if subpoenas were used. Agent Wagner also explained that he believed it was necessary to examine all the records of C&A and Pinckard and Associates in order, by comparing their books and records with the records available through banks and other businesses, to determine how the kickback money was generated through C&A. 2/25/82 Tr. 17; 1/31/86 Tr. 18-19. Accordingly, Agent Wagner and two attorneys from the Chicago Organized Crime Strike Force prepared an affidavit to accompany an application for warrants to search C&A and Pinckard and Associates. 2/26/82 Tr. 67; 1/31/86 Tr. 29-31. Thereafter, a federal magistrate issued separate search warrants authorizing the search of the administrative offices of C&A and Pinckard and Associates. Pet. App. 53-54, 55-56.[4] Before the warrants were executed, the federal agents examined Agent Wagner's affidavit and twice were briefed by Agent Wagner about both the information in the affidavit and the scope of the searches authorized by the warrants. 2/26/82 Tr. 63-64, 66, 100-101.

After searching the C&A file room and the office space occupied by Daniel Milano Sr., Daniel Milano, Jr., and petitioners Norton, Fosco, and DiFranco, the agents

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[4] The warrant for the search of C&A authorized the agents to seize "all corporate records of Consultants and Administrators, Inc.; a black vinyl book * * * containing copies of contracts, correspondence, bank statements and receipts; [and] envelopes and United States currency which are evidence and instrumentalities of the offense set forth in [18 U.S.C.] 1954." Pet. App. 53-54. The warrant for the search of Pinckard and Associates authorized the agents to seize "all corporate records" of that corporation "which are evidence and instrumentalities of the offense set forth in [18 U.S.C.] 1954." Pet. App. 55.

seized approximately 18 boxes of documents. 2/25/82 Tr. 41-43. In addition, the agents seized from Daniel Milano, Sr.'s, desk drawer seven envelopes containing a total of $12,460 in cash. In executing the C&A search warrant, the agents neither searched for nor seized the records of any other business entity. *Id.* at 37, 43-44, 53-56, 58-59; 2/26/82 Tr. 132. Thus, the agents did not seize records of other corporations that had been tied into their investigation that might have been on the premises. *Ibid.*[5] The agents also seized a smaller quantity of records from the office space in the same building that was occupied by petitioner Pinckard.

3. In a pretrial ruling, the district court suppressed all documents seized during the October 6, 1976, searches of C&A and Pinckard and Associates. Pet. App. 26-33. The court found that the supporting affidavit "clearly establishe[d] probable cause to search for certain kinds of corporate records," *id.* at 29, but the court also held that the authorization to seize "all corporate records" of C&A and Pinckard and Associates was "unconstitutionally general." *Id.* at 32.

The court of appeals reversed. Pet. App. 36-44. The court accepted for purposes of the appeal the district court's ruling that the warrants were insufficiently specific, *id.* at 39-40 n.3, but held that "[o]n the facts considered by the district court at the suppression hearing," the case fit within the good faith exception to the exclusionary rule articulated in *United States* v. *Leon,* 468 U.S. 897 (1984), and *Massachusetts* v. *Sheppard,* 468 U.S. 981

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[5] Two file cabinets in the C&A file room contained records of other corporate entities. 2/26/82 Tr. 199-200. After a cursory inspection of the file cabinets to ensure that they contained no C&A records, the agents said that they were not interested in the files and did not seize them. *Id.* at 200-210.

(1984). Pet. App. 42.[6] The court of appeals remanded the case for an evidentiary hearing on that issue. *Id.* at 43-44.[7]

4. On remand, the district court found that the parties did not adduce any new facts on the good faith issue. Pet. App. 23. Accordingly, in light of the court of appeals' observation that the evidence at the initial suppression hearing showed that the agents were acting in good faith, the district court held that the documents were admissible under *Leon* and *Sheppard*. *Id.* at 24.

5. The court of appeals affirmed. Pet. App. 1-22. It held that there was "[m]ore than adequate support" for the

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[6] The court of appeals explained that the agents " 'took every step that could reasonably be expected of them.' As in *Sheppard,* the agents submitted a detailed affidavit to a magistrate in order to secure the search warrants. The affidavit alleged a pervasive fraud that had resulted in the incorporation of a sham business to channel kickback monies to labor officials. In addition, the affidavit was reviewed by several attorneys in the U.S. Attorney's office before it was presented to a magistrate, who found probable cause and issued the warrants. * * * Moreover, the warrants' authorization to seize 'all corporate records' does not transgress the limitation on the good faith exception described by the Supreme Court as cases involving warrants 'so facially deficient—*i.e.,* failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid.' Arguably, 'all corporate records' is significantly more general than the 'any controlled substance' language contained in the *Sheppard* warrant. Even so, this is not dispositive. The question here is not the legal validity of the warrant but the reasonableness of the officers' reliance on it." Pet. App. 42 (citations omitted).

[7] The government also argued that the documents seized during the search were admissible because subpoenas that had been separately issued for the documents provided an "independent source" for their acquisition and showed that the documents would inevitably have been discovered regardless of whether the searches had been conducted. Gov't C.A. Br. 27-28, *United States* v. *Accardo*, 749 F.2d 1477 (11th Cir.), cert. denied, 474 U.S. 949 (1985). The court of appeals did not find it necessary to address that argument. Pet. App. 38 n.1.

district court's determination that the agents' reliance on the warrants was justifiable. *Id.* at 8. As the court of appeals noted, "the FBI Agent who applied for both warrants testified that he believed he needed all of C&A's and [Pinckard and Associates'] corporate records * * * to verify the kickback scheme." *Id.* at 8-9. "Because this investigation required the authorities to piece together a 'paper puzzle' given the permeative character of the fraud involved," the court found that "the agent's belief was objectively reasonable." *Id.* at 9.

ARGUMENT

1. Petitioners challenge the court of appeals' ruling that the agents who executed the search warrants for C&A and Pinckard and Associates had an objectively reasonable belief that the warrants were valid because they could reasonably have believed that it was necessary to examine all of the records of those two companies in order to discover the full scope of petitioners' kickback scheme. That ruling presents no issue of general importance and thus does not warrant review by this Court.

a. The warrant in this case was not unconstitutionally overbroad. It is well settled that where the underlying affidavit establishes sufficiently broad probable cause, the warrant may authorize a comparably broad search and seizure. See *United States* v. *Hershenow,* 680 F.2d 847, 851 (1st Cir. 1982) ("[t]he particularity and probable cause requirements of the Fourth Amendment are * * * closely related"); see also *In re Impounded Case (Law Firm)*, 840 F.2d 196, 200 (3d Cir. 1988); *United States* v. *Christine,* 687 F.2d 749, 758 (3d Cir. 1982). Courts have accordingly approved property descriptions in search warrants that were as broad in scope as the probable cause demonstration in the supporting affidavit. In addition, since the

scope of some forms of criminal activity can be detected only by piecing together myriad financial documents and since officers often do not know in advance what documents they may find, the courts have flexibly construed the particularity requirement to allow the seizure of generically described records.[8]

As the court below found, Pet. App. 43, this case involved precisely the "type of complex financial fraud" that "has been held to justify a more flexible reading of the fourth amendment particularity requirement." The information available to Agent Wagner came from an officer of C&A and the son of its vice-president. That information showed that all of C&A's bids for health benefit services were made with approval of the union officials, that the bids were prepared with the aid of information about other bidders, and that C&A's bids were invariably accepted. Afft. para. 1f. In addition, the affidavit showed that Pinckard and Associates (like Fortune Services) was a

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[8] See, *e.g.*, *In re Search of 4801 Fyler Ave.*, No. 88-1573 (8th Cir. July 13, 1989), slip op. 9 (any "correspondence, records, files, works orders, logs, or other documents" relating to hazardous wastes); *United States* v. *Brown*, 832 F.2d 991 (7th Cir. 1987) (seizure of generically described business records relating to the submission of fraudulent insurance claims), cert. denied, 108 S. Ct. 1084 (1988); *United States* v. *Kail*, 804 F.2d 441 (8th Cir. 1986) (upholding a warrant for almost all of the defendant's business records); *United States* v. *Sawyer*, 799 F.2d 1494, 1508 (11th Cir. 1986); *United States* v. *Sovereign News Co.*, 690 F.2d 569, 574, 576-577 (6th Cir. 1982) (seizure of generic business records " 'reflecting the importation, receipt, and shipment' of seizable [i.e., obscene] publications as well as 'documents reflecting the corporate structure of Sovereign News Company and any of its affiliate companies' "); *United States* v. *Hershenow*, 680 F.2d 847, 852-853 (1st Cir. 1982) (seizure of "all accident patient files"); *United States* v. *Brien*, 617 F.2d 299, 306 (1st Cir.) (approving a warrant for most of the defendant's business records), cert. denied, 446 U.S. 919 (1980).

sham corporation that had been incorporated for the sole purpose of serving as a conduit for the money received by petitioners in their kickback scheme. C&A, whose officers were parties to the scheme, was the central focus of the kickback operation. Daniel Milano, Sr., masterminded the scheme. He solicited information from local union leaders regarding competing (and supposedly secret) bids, and he agreed to pay a kickback to the union leaders for the information. The kickback was based on a fixed percentage of C&A's gross receipts from the union contracts. And Pinckard and Associates conducted at least some of its dealings on C&A's premises out of space lent to Pinckard and Associates by C&A. Moreover, Daniel Milano, Jr., told Agent Wagner that there was a "strong likelihood" that C&A would either destroy or alter its records if they were subpoenaed. Agent Wagner was therefore entitled to infer that all of the records would constitute evidence of the operation of the kickback scheme, as well as C&A's close participation in it, and also that any records not seized during the search of C&A might thereafter "disappear." Thus, the agents cannot be faulted for believing that, in light of the "permeative character of the fraud involved" in this case, all the records of C&A and Pinckard and Associates were material and needed to be seized. *Id.* at 9.[9]

b. Even if the warrant in this case was overly broad, the agents acted in good faith in obtaining the warrant, and the evidence was therefore properly held admissible

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[9] See *United States* v. *Sawyer,* 799 F.2d at 1508 (evidence of pervasive fraud justifies a broad warrant); *United States* v. *McClintock,* 748 F.2d 1278, 1283 (9th Cir. 1984) (same), cert. denied, 474 U.S. 822 (1985); *United States* v. *Offices Known as 50 State Distributing Co.,* 708 F.2d 1371, 1374-1376 (9th Cir. 1983) (same), cert. denied, 465 U.S. 1021 (1984); *United States* v. *Hillyard,* 677 F.2d 1336, 1339-1340 (9th Cir. 1982) (same); *National City Trading Corp.* v. *United States,* 635 F.2d 1020, 1026 (2d Cir. 1980).

under this Court's decisions in *United States* v. *Leon, supra,* and *Massachusetts* v. *Sheppard, supra.* In *Leon,* this Court held that the exclusionary rule "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity." 468 U.S. at 919. That is particularly true, the Court noted, "when an officer acting with objective good faith has obtained a search warrant from a judge or a magistrate and acted within its scope." *Id.* at 920. The Court reasoned that, in such circumstances, the deterrent value of the exclusionary rule is vitiated by the fact that an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the search warrant is technically sufficient. *Id.* at 921.

This Court applied that exception in the companion case of *Massachusetts* v. *Sheppard, supra,* to a search warrant that insufficiently described the items to be seized. In *Sheppard,* the trial judge suppressed evidence seized during the execution of a search warrant that incorrectly identified the items to be seized as evidence of a narcotics transaction, rather than a murder. Relying on *Leon,* this Court reversed, emphasizing that the officers had demonstrated their good faith by submitting an affidavit to a judge and thereafter relying on the judge's determination that the warrant he issued was sufficiently particularized. 468 U.S. at 989-991. See also *Illinois* v. *Krull,* 480 U.S. 340 (1987) (applying *Leon* to a state law, later held invalid, that authorized a warrantless search, even though the statute could have been more narrowly drawn).

The same considerations that prompted this Court to apply the good faith exception in *Leon, Sheppard,* and *Krull* are also present here. As the courts below concluded, it was "not so obvious" that the property descriptions in these two warrants were unconstitutionally overbroad on the facts of this case. The requirement that a warrant con-

tain a particularized description of the property to be searched includes "a practical margin of flexibility" depending on the facts of each case. *United States* v. *Wuagneux,* 683 F.2d 1343, 1349 (11th Cir. 1982) (collecting cases), cert. denied, 464 U.S. 814 (1983). That is especially true in cases "involving complex financial transactions and widespread allegations of various types of fraud." *Ibid.* See also *United States* v. *Abrams,* 615 F.2d 541, 548 (1st Cir. 1980) (Campbell, J., concurring) ("[t]he need for particularization gives rise to a dilemma in fraud investigations," because the agents "usually do not, and often cannot, know in advance precisely what they will find when they search through files pursuant to a warrant."). As this Court has recognized with respect to the particularity requirement, "the complexity of an illegal scheme may not be used as a shield to avoid detection when the State has demonstrated probable cause to believe that * * * evidence of [a] crime is in the suspect's possession." *Andresen* v. *Maryland,* 427 U.S. 463, 480-481 n.10 (1976).

In this case, the agents "took every step that could reasonably be expected of them." *Sheppard,* 468 U.S. at 989. Agent Wagner prepared an extensive affidavit that detailed a pervasive fraudulent scheme and that, as the district court noted, Pet. App. 29, "clearly establishe[d]" probable cause to search for a broad range of corporate documents. Thereafter, the affidavit was reviewed by two government attorneys before it was submitted to the magistrate. And the magistrate found probable cause to justify the searches and approved the adequacy of the description of the property to be seized. See, *e.g.*, *United States* v. *Michaelian,* 803 F.2d 1042, 1047 (9th Cir. 1986); *United States* v. *Fama,* 758 F.2d 834, 837 (2d Cir. 1985). Moreover, even if the unattached affidavit cannot be used to cure any possible overbreadth in the warrants, the

agents' use of the extensive affidavit as the basis for the pre-search briefings should be considered as evidence of their good faith under *Leon*. Cf. *United States* v. *Luk*, 859 F.2d 667, 677 (9th Cir. 1988). See also *United States* v. *Wuagneux*, 683 F.2d at 1351 n.6. Finally, the agents evidenced their good faith by confining the scope of their searches to the parameters of the warrants and declining to seize records of other corporate entities found on the premises. See *United States* v. *Luk*, 859 F.2d at 677-678. In short, the two 1976 warrants in this case were not so "facially deficient" that the executing officers could not have reasonably presumed that the warrants were valid. *Leon*, 468 U.S. at 923. See *United States* v. *Luk*, *supra*; *United States* v. *Kepner*, 843 F.2d 755, 763-764 (3d Cir. 1988); *United States* v. *Diaz*, 841 F.2d 1, 6 (1st Cir. 1988); *United States* v. *Gros*, 824 F.2d 1487 (6th Cir. 1987); *United States* v. *Buck*, 813 F.2d 588, 592-593 (2d Cir.), cert. denied, 108 S. Ct. 167 (1987); *United States* v. *Michaelian*, 803 F.2d at 1046-1047; *United States* v. *Weinstein*, 762 F.2d 1522, 1531 (11th Cir. 1985), cert. denied, 475 U.S. 1110 (1986).

Because the district court found and the court of appeals assumed that the two warrants were overbroad, petitioners contend that the reasonable mistake exception adopted in *Leon* is inapplicable in this case. Pet. 9-18. That argument reads too much into *Leon*. *Leon* held that suppression is appropriate when a search warrant is so facially deficient in failing to particularize the things to be seized that the executing officer could not reasonably presume that the warrant is valid. 468 U.S. at 923. But *Leon* did not hold that the good faith exception is inapplicable simply because a warrant is later found to be overbroad. Instead, whether the exception will apply "depend[s] on the circumstances of the particular case." *Ibid.* In this case, the permeative character of the fraud and the need to

prevent the possible destruction of C&A's and Pinckard and Associates' records justified Agent Wagner's belief that all of their records were relevant and therefore that the two warrants were not overbroad. The court of appeals' ruling therefore is consistent with the inquiry required by *Leon*.

Petitioners also contend that the Ninth and First Circuits have ruled that the exception adopted in *Leon* is inapplicable to overbroad search warrants "as a matter of law." Pet. 10. That claim is mistaken. Although those courts may have followed such an approach at one time,[10] subsequent decisions by those courts have shown that they examine this question on the facts of each case and that they have held that *Leon* is not inapplicable simply because a warrant is later found to be overbroad.

For example, in *United States* v. *Luk*, 859 F.2d 667 (9th Cir. 1988), the warrant, which authorized law enforcement officers to seize a broad range of corporate documents stored at the defendant's home, was held "unconstitutionally overbroad." *Id.* at 676 & n.6. The court nevertheless refused to suppress the evidence, noting that the officers had reasonably relied on the warrant. As the court explained, the warrant was supported by a 22-page affidavit that "related the results of an extensive investigation." *Id.* at 677. Although the affidavit could not cure the overbroad warrant, the court found that the affidavit was "evidence of good faith," because it "provided the particularity that the warrant lacked" and because the officers

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[10] As petitioners note (Pet. 10-11 n.7), several Ninth Circuit cases refused to apply the good faith exception when officers relied on search warrants later found to be impermissibly general. See *United States* v. *Dozier*, 844 F.2d 701, 708 (1988), cert. denied, 109 S. Ct. 312 (1989); *United States* v. *Spilotro*, 800 F.2d 959, 968 (1986); *United States* v. *Washington*, 797 F.2d 1461, 1472-1474 (1986); *United States* v. *Crozier*, 777 F.2d 1376, 1381 (1985).

relied on the affidavit in conducting their search. *Id.* at 677-678.

Likewise, in *United States* v. *Michaelian,* 803 F.2d 1042 (9th Cir. 1986), the warrants for a broad range of personal and business records were found to be impermissibly general "in light of the lengthy IRS investigation and detailed knowledge provided [to the agents by certain informants]." *Id.* at 1046 n.1. The court of appeals applied the good faith exception, however, finding that the warrants did not "approximate the degree of facial deficiency which would preclude objective reasonable reliance by federal agents," *id.* at 1047, even though the warrants could have been more specific. See also *Center Art Galleries—Hawaii, Inc.* v. *United States,* 875 F.2d 747, 753 (9th Cir. 1989) (noting that *Leon* applies unless "[t]he warrants were so overbroad that * * * no agent could reasonably rely on them").

The First Circuit has followed a similar course. In *United States* v. *Fuccillo,* 808 F.2d 173, cert. denied, 482 U.S. 905 (1987), that court refused to apply the good faith exception on two grounds: the agents who executed the warrant exceeded the scope of the warrant (by seizing men's clothing as well as women's clothing, even though the warrant only authorized seizure of the latter), and the agents did not take " 'every step that could reasonably be expected of them' " in describing the items to be seized. 808 F.2d at 177-178 (citation omitted). After *Fuccillo,* however, the First Circuit in *United States* v. *Diaz,* 841 F.2d 1, 6 (1988), applied *Leon* in the context of a search conducted in reliance on a warrant later found to be overbroad.[11] Accordingly, it now appears that the First Cir-

[11] Indeed, petitioners acknowledge that "there is now an internal conflict between the First Circuit's decisions in *Diaz* and *Fuccillo.*" Pet. 12.

cuit, like the Ninth Circuit, examines each case on its facts and does not regard the *Leon* doctrine as per se inapplicable to overbroad warrants.

Petitioners claim that the Tenth Circuit has held that *Leon* is inapplicable to overbroad warrants, but the case they cite, *United States* v. *Leary*, 846 F.2d 592 (1988), did not adopt any such rule. *Leary* found overbroad a warrant that authorized the seizure of all "records and correspondence" relating to the illegal exportation of arms, even though the affidavit supporting the warrant disclosed probable cause as to a single, readily identifiable illegal transaction. *Id.* at 600-606. The court noted that the case "present[ed] a different factual situation" than that in *United States* v. *Buck*, 813 F.2d at 609-610, where the court relied on *Leon* even though the warrant was insufficiently particularized.[12] The court held that the officers could not reasonably have relied on the warrant in *Leary*, because the expansive description of the property to be seized bore no relationship to the limited probable cause showing. In so holding, the court did not purport to rule that officers may not rely in good faith on an overbroad warrant; it merely held that the officers' reliance was unreasonable on the facts of that case.

Thus, the difference between the result below and the results in the cases cited by petitioners turns on a difference in the facts, not a disagreement over the relevant legal principles. While petitioners are correct that some of post-*Leon* decisions of various circuits conflicted at one time with the approach taken here and in *Buck*,[13] that conflict

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[12] Petitioners rely on *Buck*, along with the decision in this case, as being in conflict with decisions in the First, Ninth, and Tenth Circuits. Pet. 11.

[13] In our certiorari petition in *Fuccillo*, we pointed out that the prior decision in this case and *Buck* were in conflict with the First Circuit's decision in *Fuccillo* and with several Ninth Circuit decisions that

now appears to have abated as the circuits have continued to address this subject. Subsequent case law has shown that the First and Ninth Circuits now resolve *Leon* claims in this context on a case-by-case basis and have eschewed any per se rule that officers cannot be found to have reasonably relied on a warrant that is later found to be overbroad.

2. Petitioners contend (Pet. 19-26) that the district court's supplemental charge coerced the jury into returning a guilty verdict. That claim stems from the following facts:

On the morning of the second day of the jury's deliberations, juror Robert Larson sent a note to the district court. In the note, Larson said that, unlike the other 11 jurors, he had a reasonable doubt as to petitioners' guilt, and he asked to be relieved of jury duty because he was uncomfortable with the prospect of causing a mistrial. Pet. App. 18-19 & n.11. The district court consulted with defense counsel about the proper response to the note. Petitioners moved for a mistrial and opposed giving the jury an *Allen* charge.[14] Gov't C.A. Br. 54, citing 92 R. 40-47. The district court denied the defense motion for a mistrial but agreed not to give an *Allen* charge. The court then addressed juror Larson out of the presence of the other jurors. The court told Larson that he would not be replaced by an alternate juror, but also told Larson that he was "absolutely, unequivoca[lly]" not required to vote with the majority, "even under duress." The court then delivered a supplemental instruction to the jury in which the

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pre-dated *Michaelian*. 86-1622 Pet. 14-17. We noted that the decision in *Michaelian* appeared to be consistent with the majority position that the good faith exception can be applied to warrants found to be overbroad. 86-1622 Pet. 16-17.

[14] See *Allen* v. *United States*, 164 U.S. 492 (1896).

court reminded the jurors of their duty to consult with each other, to deliberate in an effort to reach a unanimous verdict if it was possible to do so without doing violence to their individual judgments, and to be willing to reconsider their views. Pet. App. 19 n.12. The court also emphasized, however, that the jurors should "not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict." *Ibid.* Petitioners renewed their motion for a mistrial, which the district court denied. Four hours later, the jury returned a guilty verdict. Pet. App. 21.

Petitioners do not (and could not) claim that the supplemental instruction was itself coercive.[15] Instead, relying on *Brasfield* v. *United States,* 272 U.S. 448 (1926), petitioners argue that the supplemental instruction was coer-

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[15] This Court has upheld the use of such supplemental instructions on four occasions. *Lowenfield* v. *Phelps,* 108 S. Ct. 546, 550-551 (1988); *Kawakita* v. *United States,* 343 U.S. 717, 744 (1952), aff'g 190 F.2d 506, 521-528 (9th Cir. 1951); *Lias* v. *United States,* 284 U.S. 584, aff'g 51 F.2d 215, 218 (4th Cir. 1931); *Allen* v. *United States, supra.* Every circuit has upheld the use of some form of a supplemental jury instruction. *Lowenfield* v. *Phelps,* 108 S. Ct. at 551 n.1 (collecting cases). Moreover, the supplemental instruction given in this case was mild and balanced. It directed the jurors to make an individual judgment on the guilt or innocence of each defendant. It was addressed to all of the jurors, not simply to juror Larson. It therefore did not run afoul of the primary criticism of the *Allen* charge—that it is directed to jurors in the minority. See, *e.g., United States* v. *Flannery,* 451 F.2d 880, 883 (1st Cir. 1971). Moreover, the charge reminded the jurors of their responsibility to listen to one another, to be open-minded and impartial, and to reach a verdict if possible. And it directed the jurors not to abandon their individual judgment in so doing. That instruction was not coercive. See *Lowenfield,* 108 S. Ct. at 551. That is particularly true since the court had previously told juror Larson in no uncertain terms that he "absolutely" and "unequivoca[lly]" was not required to vote with the majority.

cive because the district court was aware of the jury's numerical division as a result of juror Larson's note. This case, however, is materially different from *Brasfield*. There, the trial judge asked the foreman how the jury stood numerically. Upon learning that the jury stood nine to three, the trial court delivered an *Allen* charge. This Court reversed, holding that a trial court should not ask a deadlocked jury for its numerical division, since that inquiry is potentially coercive and "serves no useful purpose that cannot be attained by questions not requiring the jury to reveal the nature or extent of its division." 272 U.S. at 450.

In this case, by contrast, the trial court did not ask the jury where it stood on the defendants' guilt or innocence. Juror Larson volunteered that information in the note he sent to the judge asking for guidance. That difference is critical. Underlying the ruling in *Brasfield* is the belief that the combination of a trial court's inquiry into the jury's numerical division and the use of a traditional *Allen* charge (*i.e.*, one that focuses on the jurors in the minority) might coerce those jurors in the minority to abandon their views simply to achieve unanimity. That risk was not present here. In response to juror Larson's note, the court told Larson in the strongest possible terms that he was under no obligation to abandon his honestly held views, and petitioners do not challenge those remarks. The court's subsequent use of a modified *Allen* charge, therefore, was not likely to have intimidated Larson. Indeed, the fact that the court gave the charge to the entire jury panel could well have eased Larson's mind by formally instructing the other jurors that Larson was under no obligation to "surrender [his] honest conviction * * * solely because of the opinion of [his] fellow jurors or for the mere purpose of returning a verdict." Pet. App. 19 n.12. Finally, the fact that the jury deliberated for approximately four hours

after the trial court gave the instruction is evidence that the instruction did not coerce juror Larson into abandoning his views.[16] For similar reasons, the courts of appeals have held that the rule of automatic reversal adopted in *Brasfield* does not apply when information regarding the jury's division is not solicited by the judge, but is volunteered by the jurors.[17]

There is no conflict among the circuits on this issue. Petitioners maintain (Pet. 20-21) that the decision below conflicts with the Ninth Circuit's decision in *United States* v. *Sae-Chua,* 725 F.2d 530 (1984), but that decision is distinguishable. There, the jury foreman revealed to the court that a majority favored guilt, but that one juror favored acquittal. After polling the jury on the question whether further deliberations would be useful, the district court gave a modified *Allen* charge. 725 F.2d at 531. In reversing the conviction, the Ninth Circuit found that, under the circumstances of that case, the combination of the

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[16] See, *e.g., United States* v. *Nichols,* 820 F.2d 508, 512 (1st Cir. 1987) (one-hour gap not coercive); *United States* v. *Bailey,* 468 F.2d 652, 664 (1972), aff'd, 480 F.2d 518 (5th Cir. 1973) (en banc) (90-minute gap not coercive). Compare *Lowenfield* v. *Phelps,* 108 S. Ct. at 552 (30-minute gap raised "possibility of coercion").

[17] *E.g., United States* v. *Rengifo,* 789 F.2d 975, 985 (1st Cir. 1986); *United States* v. *Akbar,* 698 F.2d 378, 380 (9th Cir.), cert. denied, 461 U.S. 959 (1983); *United States* v. *Cook,* 663 F.2d 808, 809 n.3 (8th Cir. 1981); *United States* v. *Warren,* 594 F.2d 1046, 1049 n.3 (5th Cir. 1979); *United States* v. *Diggs,* 522 F.2d 1310, 1322 (D.C. Cir. 1975), cert. denied, 429 U.S. 852 (1976); *United States* v. *Jennings,* 471 F.2d 1310, 1314 (2d Cir.), cert. denied, 411 U.S. 935 (1973); *Gafford* v. *Warden,* 434 F.2d 318, 319 (10th Cir. 1970); *United States* v. *Sawyers,* 423 F.2d 1335, 1340-1341 (4th Cir. 1970); *Sanders* v. *United States,* 415 F.2d 621, 629, 631-632 (5th Cir. 1969), cert. denied, 397 U.S. 976 (1970); *United States* v. *Rao,* 394 F.2d 354, 356 (2d Cir.), cert. denied, 393 U.S. 845 (1968); *Bowen* v. *United States,* 153 F.2d 747, 752 (8th Cir.), cert. denied, 328 U.S. 835 (1946).

foreman's note and the poll of the jury tended to identify and isolate the sole dissenter, and that the modified *Allen* charge was likely to coerce that juror. *Id.* at 532. By contrast, in this case it was juror Larson himself who volunteered both the jury's division and his status as the lone dissenter, and the court's supplemental instruction simply reaffirmed what the court had already made clear to Larson—that he was not required to abandon his sincere convictions.[18] *Lowenfield* v. *Phelps,* 108 S. Ct. 546, 552 (1988), held that the coercive effect of a trial court's actions must be assessed on a case-by-case basis.[19] As in

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[18] To the extent that *Sae-Chua* can be read to have criticized the district court's inquiry into the usefulness of further deliberations by the jury, rather than into its numerical division, that criticism is no longer valid after *Lowenfield,* which distinguished such an inquiry from the one prohibited by *Brasfield.* 108 S. Ct. at 552.

[19] The remaining cases cited by petitioner or the court below are inapposite. *Cornell* v. *Iowa,* 628 F.2d 1044 (8th Cir. 1980), cert. denied, 449 U.S. 1126 (1981), was a federal habeas corpus proceeding. The court held that the state trial court's inquiry into the jury's division followed by the use of an *Allen* charge was not unconstitutionally coercive on the facts of that case. 628 F.2d at 1047-1048. In *Holt* v. *Wyrick,* 649 F.2d 543 (8th Cir. 1981), another federal habeas corpus proceeding, the state trial court declared a mistrial after the foreman, in response to an ambiguous inquiry from the trial judge, disclosed the jury's numerical division. 649 F.2d at 550-551 & n.9. The court held that the retrial did not violate the Double Jeopardy Clause. *Id.* at 551-552. The court did not decide whether the state trial court's actions were coercive. In *United States* v. *Webb,* 816 F.2d 1263 (8th Cir. 1987), the district court asked the foreman for the jury's division and then gave a modified *Allen* charge, and the jury returned a verdict of guilty 15 minutes later. The court held that the totality of the circumstances required reversal. 816 F.2d at 1267. Finally, in *Williams* v. *United States,* 338 F.2d 530, 531 (D.C. Cir. 1964), the district court asked the foreman whether there was " 'a clear minority' " after the foreman asked the court, " 'Can the [two] alternate jurors replace the minority voters?' " The court of appeals found that, under the circum-

Lowenfield, the facts in this case do not warrant an inference of coercion.[20]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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stances, the trial court's inquiry was similar to the type of inquiry prohibited by *Brasfield*. That case is distinguishable for the reasons given in the text.

[20] Petitioners also contend (Pet. 23-24) that the trial judge should have questioned juror Larson regarding the source of the "duress," but as the court of appeals noted, Pet. App. 22, the trial judge correctly decided not to intrude into the jurors' thought processes. See *Tanner* v. *United States*, 483 U.S. 107, 116-127 (1987); Fed. R. Evid. 606(b).

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